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IN THE
COURT OF APPEALS OF INDIANA

ANITA L. THOMAS, et al.,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 43A05-0604-CV-212
	)	
TOWN OF WINONA LAKE,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable Duane G. Huffer, Judge
Cause No. 43D01-0503-PL-205

October 17, 2006

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Judge

Appellants-plaintiffs Anita L. Thomas, et al. (collectively, Lot Owners), appeal from the trial court's order granting partial summary judgment in favor of appellee-defendant Town of Winona Lake (Town). Specifically, the Lot Owners argue that the trial court erred in refusing to find that the Lot Owners own fee title to property underlying a public easement. Finding that the grantor reserved fee title in the property at issue for itself and then deeded its interest to the Town, we affirm the judgment of the trial court.

FACTS

On October 22, 1901, the Winona Assembly and Summer School Association (the Assembly) recorded the plat to Winona Park in Kosciusko County. The plat included numerous lots, two streets now called East Canal Street and West Canal Street (the Streets)—each of which is fifty feet wide—and a strip of land, called "Laguna," which is seventy feet wide and runs parallel to and in between the Streets. Appellants' App. p. 13. The Assembly subsequently excavated a canal (Canal) within the Laguna but did not excavate to the entire width of the strip of land. The Canal opens at each end into Winona Lake. The Lot Owners own lots[1] that front either East or West Canal Street and face the Canal, which is directly on the other side of the street.

Subsequent to 1901, the Town came into existence, and for a period in excess of fifty years, it has regulated, maintained, and controlled the Streets. The Town argues, and the trial court agreed, that it has also regulated, and controlled the Laguna and the

[1] The Lot Owners own some, but not all, of the lots located on the Streets.

Canal, but the Lot Owners dispute that finding. The Town has enacted various ordinances throughout the years regulating piers in the Canal.

An original deed from the Assembly to a predecessor of a Lot Owner conveyed Lot 71 "together with the right to pass over adjacent avenues and along avenues leading to the several entrances to said grounds . . . ." Appellee's App. p. 33. Apparently, the language in this deed is typical for the original deeds conveying all of the lots at issue.

At some point in 2005, the Town passed Ordinance 2005-2-2 (the Ordinance), which is designed to regulate the construction, use, and maintenance of piers and sea walls upon the Canal. Among other things, the Ordinance contains a Canal Space Rental Agreement that permits an interested party to rent and use a canal space and to construct and use a pier on the Canal. Although Lot Owners have a right of first refusal, if there are remaining unclaimed canal spaces during a calendar year, anyone is free to enter into a canal space rental agreement with the Town.

On March 15, 2005, the Lot Owners filed a "Complaint to Quiet Title, for Slander of Title, and for Injunction for Damages, and to Declare Ordinance 2005-2-2 of the Town of Winona Lake Void and Unenforceable, and for Accounting" against the Town and other defendants. Appellants' App. p. 15. Among other things, the complaint raised the following allegations: (1) the Lot Owners have a fee simple title in the land underlying the concededly public right-of-way in the Street in front of their respective lots and in the strip of land on the waterfront between the Street and the Canal; (2) the Ordinance is void and unenforceable because it enables the Town to enter into rental agreements for property that it does not own; and (3) the Lot Owners have been forced to pay rental fees

to the Town to protect their property rights in the canal spaces and piers in front of their respective residences.

On October 18, 2005, the Lot Owners filed a motion for partial summary judgment against the Town, arguing, among other things, for summary judgment in their favor with respect to the fee simple ownership of the property underlying the Streets and to the strip of land between the Streets and the Canal. The Assembly merged into Grace Schools, Inc. (Grace College), in 1988, and on December 5 and 13, 2005, Grace College conveyed its interest in the Laguna and the Streets to the Town. At the hearing on the Lot Owners' partial summary judgment motion on December 16, 2005, the trial court permitted the Town to file the deeds from Grace College to the Town as designated evidence.

On February 9, 2006, the trial court denied the Lot Owners' motion and entered judgment in favor of the Town on the quiet title claim and the claim seeking a declaration that the Ordinance is void and unenforceable, finding, among other things, as follows:

> 1. [East and West Canal Streets] were irrevocably dedicated as ground for public purpose of a laguna, a canal, by express dedication by plat, duly recorded, and the sale of building lots in reference thereto. . . .
>
> 2. The Town . . . is a trustee of the streets and area designated Laguna for the public. . . .
>
> 3. An adjoining landowner of a public street or public ground cannot have title in the public street or public ground quieted in such owner. . . .
>
> 4. [The Town] has the power to lease pier space within the public area designated Laguna. . . .

5. The power of [the Town] to lease pier space along the edge of the canal in the area designated Laguna is not pre-empted by, nor in conflict with the Indiana Department of Natural Resources. Any pier placed in the canal would need [to] meet the requirements of any regulation of the Indiana Department of Natural Resources . . . .

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IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of [the Town] and against the [Lot Owners] on the . . . complaint to quiet title in and to [East and West Canal Streets] and the public ground designated Laguna . . . .

The Court determines there is no just reason for delay and expressly directs entry of final judgment in favor of [the Town].

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the leasing of pier space by [the Town] with the area designated Laguna . . . is not an improper taking under the Indiana and federal constitutions and is allowed pursuant to I.C. 36-1-3-1 et seq. The Court determines there is no just reason for delay and expressly directs entry of final judgment in favor of [the Town].

Appellants' App. p. 11-12.

On March 3, 2006, the Lot Owners filed a motion to correct error in which they: (1) argue that the public dedication gives the Town an easement in, but not ownership of, the Streets and the Laguna; (2) clarify that they are not seeking to quiet title in the Streets themselves but are seeking fee title in the land underlying the Streets subject to any and all public easements; and (3) state that the trial court's order was ambiguous with respect to their slander of title claim and request that the claim be held over for trial or decided in their favor. On March 13, 2006, the trial court permitted the Lot Owners to submit

additional discovery responses from Grace College. On March 27, 2006, the trial court denied the motion to correct error.[2] The Lot Owners now appeal.

DISCUSSION AND DECISION

I. Standard of Review

Where a motion to correct error is grounded upon a claim that the trial court erred by granting summary judgment, we review on appeal the grant of summary judgment. Rishel v. Estate of Rishel ex rel. Gilbert, 781 N.E.2d 735, 738 (Ind. Ct. App. 2003). Summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

An appellate court faces the same issues that were before the trial court and follows the same process. Id. at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully

[2] The status of the slander of title claim remains unclear, though the chronological case summary contains an April 14, 2006, entry continuing the trial.

scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id.

II. Title

A. Subject Matter Jurisdiction

Before turning to the substance of the Lot Owners' arguments, we must respond to the Town's argument that we do not have subject matter jurisdiction over this appeal because the issue is not ripe. In particular, the Town contends that because the Lot Owners concede that the Streets and the Laguna are irrevocably dedicated to the public and because there is no evidence or suggestion that the Town seeks to treat the property otherwise, there is no need to consider the issue of fee simple ownership. Although that may be true, the Town is also claiming ownership of the Streets and the Laguna by virtue of the quitclaim deeds from Grace College. Inasmuch as both the Lot Owners and the Town are claiming ownership of the fee title underlying the public right of way in the Streets and the Laguna, the quiet title action is ripe and properly before us.

B. Fee Title Underlying Public Right of Way

The Lot Owners argue that the trial court erred in refusing to find that they own fee title to the property underlying the public right of way in the Laguna and the Street opposite their respective lots.[3] Initially, we observe that the primary documents herein

[3] The Town contends that the Lot Owners have waived at least one of their arguments because they failed to raise it in their motion to correct error. It is well settled, however, that a party does not waive its right to appeal an otherwise properly preserved issue by omitting it from a motion to correct error so long as the issue neither concerns newly discovered evidence nor an excessive or inadequate jury verdict. C.A.M. ex rel. Robles v. Miner, 835 N.E.2d 602, 605 (Ind. Ct. App. 2005). The Town's argument to the contrary is based on a case referring to Trial Rule 59 before it was amended. Thus, inasmuch as none of

are the original plat and the deed from the Assembly to the original predecessor of one of the Lot Owners. We must look to both documents to determine the intent of the grantor. See King v. Ebrens, 804 N.E.2d 821, 828 (Ind. Ct. App. 2004) (holding that when lands are granted according to a plat, the plat becomes part of the grant or deed by which the land is conveyed).

In interpreting a deed, the object is to identify and implement the intent of the parties to the transaction as expressed in the plain language of the deed. Kopetsky v. Crews, 838 N.E.2d 1118, 1123 (Ind. Ct. App. 2005). Whenever possible, we apply the terms of the deed according to their clear and ordinary meaning. Id. Courts may resort to extrinsic evidence to ascertain the intent of the parties only where the language of the deed is ambiguous. Id. A deed is ambiguous if it is susceptible to more than one interpretation and reasonably intelligent persons would honestly differ as to its meaning. Id.

Here, the plat does not mention the Laguna—other than noting its existence in the schematic drawing—and only mentions the Streets in the following provision: "The streets and alleys upon this plat shall at all times be under the control and subject to the rules and regulations of the undersigned [Assembly]." Appellants' App. p. 67. As for the deed, in addition to conveying the lot or lots to the new landowner, it gives the new landowner the right to use and occupy the lot for a private residence and "the right to pass

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their arguments concern newly discovered evidence or a jury verdict, the Lot Owners have not waived any arguments for failing to include them in their motion to correct error. That being said, the Lot Owners do not contest on appeal the trial court's conclusion that the Town is entitled to lease pier space along the edge of the Canal to private citizens.

over adjacent avenues and along avenues leading to the several entrances to said grounds . . . ." Appellee's App. p. 33. As noted above, the Lot Owners have conceded that the Laguna and the Streets are irrevocably dedicated to the public. So the only question is whether the original plat and deed suffice to give the Lot Owners fee title in the property underlying the public right-of-way.

The Lot Owners direct us to a number of cases purportedly standing for the proposition that a landowner whose property abuts a public street automatically owns fee title to the land underlying half of the street that is adjacent to her property. See L. & G. Realty & Constr. Co., Inc. v. City of Indianapolis, 127 Ind. App. 315, 139 N.E.2d 580 (1957); Jose v. Hubber, 60 Ind. App. 569, 103 N.E. 392 (1913); Bergan v. Coop. Ice & Fuel Co., 41 Ind. App. 647, 84 N.E. 833 (1908). Furthermore, the Lot Owners contend that a property owner whose property abuts a public street, which in turn abuts a strip of land adjacent to a waterway, automatically owns fee title to the land underlying the street, the strip of land, and under certain circumstances, the waterway itself. See Ross v. Faust, 54 Ind. 471 (Ind. 1876); Earhart v. Rosenwinkle, 108 Ind. App. 281, 25 N.E.2d 268 (1940); Irvin v. Crammond, 58 Ind. App. 540, 108 N.E. 539 (1915).

Admittedly, some of the cases cited by the Lot Owners apply a presumption that the grantee of a lot in a recorded plat owns fee title to the center of adjoining public ways and/or waterways. But those cases also note that this presumption is applied only if nothing in the deed establishes the grantor's contrary intention. Ross, 54 Ind. 471; Earhart, 25 N.E.2d at 272; Irvin, 58 Ind. App. at 540-41, 108 N.E. 539. This rule makes

complete sense, inasmuch as the intent of the parties is of primary importance in interpreting a deed. Kopetsky, 838 N.E.2d at 1123.

Here, as noted above, the parties agree that the Laguna and the Streets are irrevocably dedicated to the public. Neither the plat nor the deed indicate that the Assembly intended to convey the fee title to that property to the public or to a governmental entity; thus, we conclude that the documents merely irrevocably dedicated that property for public purposes.

As for the Lot Owners, the deed explicitly grants them only an easement for access to the local streets. Even assuming that under certain circumstances we would presume that the Lot Owners own the fee title to the center of the Street in front of their respective lots, such is not the case herein because the grantor specified that the new property owners received only an easement for access. See L. & G., 127 Ind. App. at 323, 139 N.E.2d at 585 (holding that as a general rule, "where a particular or special right or easement in land is conveyed, which may well co-exist and be engaged and used by the grantee consistently with the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed"). If the Assembly had so intended, it could have conveyed an interest in the Streets and/or the Laguna to the Lot Owners. It did not. Inasmuch as the Lot Owners do not own fee title to any portion of the Streets, there is no authority supporting an argument that, regardless of that fact, they own fee title to any waterfront property or the Canal itself.

Because the Assembly granted only easements to the public and the Lot Owners to the Streets and the Laguna, we must conclude that it reserved fee title for itself. When

Grace College, the Assembly's successor in interest, conveyed its remaining interest in the Streets and the Laguna to the Town, therefore, it conveyed the fee title to that property to the Town.[4] The Lot Owners argue that because Grace College indicated in discovery responses that it had not exercised control over the Streets or the Laguna for more than fifty years, it necessarily admitted that it had no interest in that property to convey to the Town. But because the land was publicly dedicated, the Town has been regulating and maintaining the property throughout the decades; therefore, we see no reason that Grace College would have exercised control over the land.

In sum, the record before us establishes that the Streets and the Laguna are irrevocably dedicated to the public. The Assembly, in its original deed, gave the Lot Owners an easement for access in the Streets, but it retained fee title in the Streets and the Laguna for itself. Thus, when the Assembly's successor in interest, Grace College, conveyed its interest to the Town via quitclaim deed, it succeeded in conveying fee title to that property to the Town. The trial court properly entered judgment in favor of the Town on the Lot Owners' complaint.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.

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[4] That being said, the property is still—and will always be—irrevocably dedicated to the public. Consequently, the Town must still maintain and use the Streets and the Laguna for that purpose—and it represents on appeal that it has no intention of doing otherwise.